

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 24 June 2003

Case No.: 2001-SCA-0022

In the Matter of:

U.S. DEPARTMENT OF LABOR,
Plaintiff

v.

GROBERG TRUCKING, INC. &
KENNETH R. GROBERG, Individually
Respondent

APPEARANCES:

Jennifer A. Casey, Esquire
John Rainwater, Esquire
For the plaintiff

David J. Holdsworth, Esquire
For the respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the provisions of the McNamara-O'Hara Service Contract Act of 1965 (41 U.S.C. §351 et seq) (hereinafter "the Act"), and the Regulations issued thereunder at 29 C.F.R. Part 4.

I. STATEMENT OF THE CASE

In August 2000, the Wage and Hour Division (hereinafter "WHD") of the United States Department of Labor initiated an investigation of Kenneth Groberg, individually, and Groberg Trucking, Inc., (both hereinafter "Groberg Trucking"), mail haulage operations in Wyoming. The

Division determined that Respondent failed to pay its drivers the prevailing wage rate as required by the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 351, et seq. (hereinafter "Act"). (Tr. 47). The Division determined that Respondent 1) failed to accurately record employee hours, 2) failed to pay service employees an increased wage rate as required by the employment contract, and 3) failed to pay the required hours of vacation for one employee.

On August 14, 2001, the U.S. Department of Labor filed an administrative complaint with the Office of Administrative Law Judges. The complaint requested back wages of \$51,186.22 and debarment of Respondent from future government contracts. (ALJX 1). In its amended complaint on October 24, 2002, the Department alleged ongoing violations and amended its back pay total to \$92,663.92. (ALJX 12). A formal hearing occurred in Salt Lake City, Utah from November 5 to November 6, 2002.

The findings and conclusions which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

II. ISSUES

Before the hearing, the following issues were presented for resolution:

A. Whether Respondent violated the Act by failing:

- (1) to pay employees minimum monetary wages;
- (2) to furnish employees fringe benefits; and
- (3) to make and maintain accurate records of the number of daily and weekly hours worked by each employee; and

B. Whether "unusual circumstances" exist as to relieve Respondent from debarment as imposed by §5(a) of the Act.

At the formal hearing, Respondent admitted that it had failed to pay its employees minimum monetary wages and furnish its employees with earned fringe benefits. (Tr. 24-28). Respondent's failure to pay its employees minimum monetary wages resulted from its failure to implement a periodic wage increase from July 1, 1999 to the middle of August 1999. (Tr. 25-26). Respondent's failure to implement the wage increase resulted in an underpayment to four employees totaling \$341.00. (Tr. 25). Respondent never contested its failure to pay the wage increase and stipulated to pay it. Respondent also admitted at the hearing that it had failed to properly grant vacation time to employee Larry Eckholm. (Tr. 26). Respondent agreed to pay the fringe benefit.

In addition, Respondent notified the court of a third problem, unbeknownst to both parties until right before the hearing. From August 1998 to June 30, 1999, Respondent failed to pay its drivers the prevailing wage rate of \$15.30 per hour. Instead, Respondent continued to pay its employees the previous wage rate of \$15.06 per hour. (Tr. 27).

Accordingly, the sole issue at the hearing was Respondent's failure to make and maintain accurate records of the number of daily and weekly hours worked by each employee after Respondent offered its admissions and stipulations.

Plaintiff originally sought to recover back wages for the period from August 1998 to August 2000 totaling \$51,186.22 and to debar Groberg Trucking, Inc., and Kenneth Groberg from future government contracts. (ALJX 1). On October 24, 2002, Plaintiff amended its complaint to cover the period from August 28, 1998 to August 15, 2002, increasing back wages due to \$92,663.92. After an error in wage calculation was identified by the parties, the amount was amended to \$94,578.51. In November 2002, Groberg Trucking provided the Department with missing and supplemental payroll documentation for the periods September 2000, November 16, 2001 through December 31, 2001, and August 15, 2002 to October 8, 2002. In light of the new material, back wages were updated to encompass all relevant payroll periods from August 28, 1998 through October 8, 2002. As provided at the hearing, Plaintiff is not seeking back wages after October 8, 2002. (Tr. 377-78, 383). Accordingly, supplemental back wages were calculated for seven employees in the amount of \$9,265.02. Pursuant to the Joint Stipulation, the parties agree that back wages amounting to \$103,843.53 for the period August 28, 1998 to October 8, 2002, are due and payable by Groberg Trucking, Inc. and Kenneth Groberg, individually, if the Department of Labor's estimations of actual hours are found reasonable by this Court. (Department of Labor's Post-Hearing Brief, p. 18 and Exhibit 1 "Joint Stipulation of Back Wages").

The breakdown of back pay allegedly owed is as follows:

<u>EMPLOYEES</u>	<u>AMOUNT DUE</u>
James C. Best	\$63.25
John Connell	\$6,026.41
Joseph DiJohn	\$2,295.26
Larry Eckholm	\$11,765.08
Patrick D. Frank	\$1,153.97
Richard Kranz	\$8,461.07

<u>EMPLOYEES</u>	<u>AMOUNT DUE</u>
Charles Liesenfeld	\$28,000.83
Ronald V. Martin	\$21,070.54
John J. Meier	\$10,585.49
Gary L. Moss	\$661.36
Lance Porter	\$263.59
Voylan ReinsbacII	\$60.59
Mark Simmons	\$10,459.51
Michael Matthie	\$278.55
Duane WhiteEyes	\$2,698.03
TOTAL AMOUNT DUE =	\$103,843.53

III. STIPULATIONS

The parties stipulate to the following facts:

1. Contract No. 82036 was awarded to Groberg Trucking, Inc. by the United States Postal Service on August 17, 1996.
2. Contract No. 82036 was awarded for the performance period of August 17, 1996 to June 30, 1999, subject to periodic renewals.
3. Contract No. 82036 is governed by the Service Contract Act.
4. The specified wage rates and fringe benefits contained in Wage Determination 77-0194, dated June 17, 1998, are applicable to Contract No. 82036 for the period August 17, 1998 to June 30, 1999.
5. The specified wage rates and fringe benefits contained in Wage Determination 77-0194, dated June 24, 1999, are applicable to Contract No. 82036 for the period July 1, 1999 to June 30, 2001.

6. The specified wage rates and fringe benefits contained in Wage Determination 77-0194 (rev. 31, A-2), dated June 28, 2001, are applicable to Contract No. 82036 for the period July 1, 2001 to present.

7. Groberg Trucking, Inc. failed to retroactively apply a wage increase, effective July 1, 1999, to four employees, resulting in unpaid wages of \$341.18.

8. Groberg Trucking, Inc. failed to pay employee Larry Eckholm an increased hourly vacation rate for a two-week period, resulting in unpaid back wages of \$374.10.

9. If the Administrative Law Judge determines that the U.S. Department of Labor's estimate of hours worked on the respective mail runs is correct, then Respondents agree that the total amount of back wages owed to former and current employees totals at least \$92,959.02, as reflected in Joint Exhibit 7.¹

10. The Administrative Law Judge has jurisdiction in this matter.

See "Joint Stipulations."

IV. CASE HISTORY AND TESTIMONY

A. Previous Investigations of Kenneth Groberg and Groberg Trucking

In May 1992, Joi Lin Allen, a then-investigator for WHD, contacted Mr. Groberg as part of an investigation into the time-keeping practices of the company. (Tr. 287, 328-30). When Ms. Allen requested payroll records, she was informed that the payroll records were currently in the possession of the Internal Revenue Service. (Tr. 287). Thus, Ms. Allen conducted her investigation primarily through interviews, interviewing Mr. Groberg and one other employee. (Tr. 287-89). She never received copies of the time cards. (Tr. 296). Ms. Allen inquired into the type of records kept, the format of records, the method of payment, etc. (Tr. 289). From her interviews, Ms. Allen determined that the company was not keeping proper time records. Instead of keeping daily and weekly tracks of every hour and fraction of an hour worked by an employee, the company was merely tracking the total numbers of hours worked each pay period. (Tr. 289-90). Mr. Groberg testified that, at the time of the first investigation, he was paying drivers on a monthly

¹ In the parties' "Joint Stipulation of Back Wages," the parties offer a more current stipulation, stating, "The parties hereby stipulate that the revised back wage assessment of \$103,843.53 is due and payable by Groberg Trucking, Inc. and Kenneth Groberg, individually, if the Department prevails on the merits of this litigation and the Court finds reasonable the Department's estimates of actual hours worked by service employees on the Wyoming contract." (Department of Labor's Post-Hearing Brief, p. 18 and Exhibit 1 "Joint Stipulation of Back Wages #3").

basis. (Tr. 330). When he found out he was not in compliance with the Act and its implementing regulations, he said he changed the company procedures. (Tr. 330). He testified, "I just flat out...had no idea how to be in compliance with all of this stuff." (Tr. 330).

Ms. Allen held a closing conference with Mr. Groberg and explained steps for him to take to bring the company into compliance. (Tr. 290-91). Ms. Allen testified that Mr. Groberg was very cooperative, unaware that his record keeping practices were inaccurate, and amenable to future compliance. (Tr. 293). No back wages were assessed during the first investigation. (Tr. 291-92).

A second investigation was started when a former employee of the company contacted Ms. Allen after her investigation was completed. Ms. Allen took the employee's statement, and the case was assigned to another investigator. (Tr. 294-95, 305). Michael Jones, an investigator for WHD, was assigned the case, and he investigated the company for the period from June 1992 to June 1994. (Tr. 302-04). Mr. Jones conducted an initial meeting with Mr. Groberg, toured the Salt Lake City Post office, reviewed the company's payroll records from June 1992 to June 1994, interviewed six of the ten current employees, and conducted a final conference with Mr. Groberg. (Tr. 307-08). He described Mr. Groberg as cooperative. (Tr. 320).

As a result of his investigation, Mr. Jones identified three separate violations of the Act: 1) employees were not receiving full wages for all hours worked, 2) employer failing to keep daily and weekly accountings of hours worked by employees, and 3) employer failing to pay enough for employee health and welfare benefits, pension benefits, holiday benefits, and vacation benefits. (Tr. 308-11). Each violation required a remedy of back wages according to Mr. Jones. (Tr. 311). He determined that seven employees of the company were owed back wages totaling approximately \$27,000.00 for the period from June 1992 to June 1994. (Tr. 311).

In a break from normal procedure, the back wages were collected from Groberg Trucking by WHD and distributed to the individual employees. (Tr. 312-13, 332-33). Mr. Jones explained that the break in procedure was founded upon a finding during the investigation that the employees of the company were "employer-oriented." (Tr. 313). Jones stated, "[I]t appeared as if they [Groberg employees] were somewhat reluctant to provide information regarding violations because it appeared as if they were afraid of losing their jobs." (Tr. 323). Jones added further that some employees expressed concern that they may be asked to return the money to the company. (Tr. 313-14). During his final meeting with Mr. Groberg, Jones explained to him that the return of back wages would be a violation of the Act. (Tr. 314). Mr. Jones testified that Mr. Groberg indicated he understood the ramifications if employees returned money and promised to bring his company into compliance. (Tr. 314-15).

Mr. Jones also discussed the future possibility of debarment with Mr. Groberg during their final conference. (Tr. 316-17, 322). In addition, Mr. Jones provided Mr. Groberg with written materials to, generally, aid his understanding of the Act and, specifically, address how an employer is required to keep specific hours tracked for employees. (Tr. 318).

After the final conference, Mr. Groberg and Groberg Trucking entered into a stipulation with WHD. (Tr. 315, 332; JX 9, p. 1-2). In relevant part, the stipulation reads:

6. Contrary to the requirements of the Act, its regulations, and the aforesaid contract, Groberg Trucking, Inc., failed to pay certain service employees performing on the aforesaid contract the required hourly wage rates and fringe benefits for hours worked on the contract.

7. Because of the violations mentioned in paragraph 6, above, back wages of \$27,496.96 were determined to be due seven service employees that performed on the contract.

8. Groberg Trucking, Inc. quickly entered into an agreement with the U.S. Department of Labor to restore the back wages discussed in paragraph 7 to the affected service employees. The back wages have been restored.

9. The failure of Groberg Trucking, Inc., to comply with the Act, its regulations, and the contract was the result of unusual circumstances.

10. Kenneth Groberg hereby states that Groberg Trucking, Inc., is currently in compliance with the Act, its regulations, and contracts covered by the Act (not limited to the contract mentioned in paragraph 4, above).

11. Kenneth Groberg and Groberg Trucking, Inc., understand that this stipulation is being entered into for the purposes of an administrative settlement of this matter and further understand that this particular investigation will not, in and of itself, be cause for the debarment of Groberg Trucking, Inc., under the Act.

12. This stipulation may be used in any further proceedings brought under the Act in order to demonstrate that Groberg Trucking, Inc., violated the Act at the times and in the manners specified above. Furthermore, Kenneth Groberg and Groberg Trucking, Inc., waive all objections which they may have to the introduction of this stipulation in any future proceeding brought under the Act.

(JX 9, p. 1-2). Kenneth Groberg signed the stipulation on September 3, 1994.

After the company paid the back wages, via transferring checks to the WHD, two employees returned their back wages to the company. (Tr. 333-34). Mr. Groberg denied either requesting the money or threatening any driver's job if they did not return the money. (Tr. 334, 412). Rather, Groberg stated that his then-attorney asked him if his employees would return the money. (Tr. 332) When Groberg said they would, his attorney advised him to admit guilt, pay

WHD the back wages, and allow the employees to return it to him when the money was dispersed. (Tr. 332, 412). Groberg explained that the two employees who returned money – Jason Campbell and Mike Campbell – were brothers of Mr. Groberg’s son-in-law. (Tr. 334). Mr. Groberg called them “family.” (Tr. 334). Despite telling them that they were not obligated to do so, the men returned their back wages to Groberg, although Mr. Groberg could not remember when and how they returned it. (Tr. 334-35).

B. Current Investigation

In August 2000, WHD initiated an investigation of Kenneth Groberg and Groberg Trucking covering the period from August 1998 to August 2000. (Tr. 40, 42, 102; ALJX 1). The investigation was conducted by senior WHD investigator Diane Rhodes. (Tr. 34, 38).² Ms. Rhodes first conducted a telephonic “opening conference” with Mr. Groberg. (Tr. 42). She explained the purpose of the investigation and requested that Mr. Groberg provide WHD with certain documentation. (Tr. 42). She testified that Mr. Groberg was cooperative and provided all the requested materials. (Tr. 107-08, 391). Although Mr. Groberg was cooperative with Ms. Rhodes during her investigation, he believed that “she had already made her mind up.” (Tr. 391). “She just had that attitude about her,” he testified. (Tr. 391). Groberg believed his company was in full compliance with the Act and implementing regulations because he was paying his drivers for 10 hours, when he estimated that it should take less time than that to complete. (Tr. 392, 415, 417). He believed he was overpaying the drivers. (Tr. 392).

Ms. Rhodes interviewed four former employees of Groberg Trucking - Richard Kranz, John Meier, Larry Eckholm and Joseph DiJohn. (Tr. 43). A fifth, current employee, Charles Liesenfeld, refused to be interviewed, which Ms. Rhodes stated was rare. (Tr. 44). Ms. Rhodes was unsuccessful in contacting a sixth employee, Ron Martin. (Tr. 44, 109). To determine who to interview, Ms. Rhodes simply requested and received a list of all the company’s employees over the past five years and determined which of the employees would have worked during the investigation period. (Tr. 108). She testified that 11 employees worked during that time, and she interviewed whomever she could contact successfully. (Tr. 108, 131). All interviews were telephonic, except for an in-person interview with John Meier. (Tr. 108). Ms. Rhodes testified that her contact with 5 of the 11 employees was a good percentage, citing a normal range from 20 to 25 percent. (Tr. 131).

According to Ms. Rhodes, the interviewed employees provided her with detailed information about the various mail runs, their duties during the mail runs, and the scheduling of the mail runs. (Tr. 45). Specifically, employees broke down their days into component parts - from

² Ms. Rhodes has bachelor’s degrees in economics and psychology from Metropolitan State College. (Tr. 32). Ms. Rhodes began work for WHD in 1978, and she has recently retired. (Tr. 32, 34). She estimated that she conducted over 1,000 investigations for WHD during her tenure as an investigator. (Tr. 34).

warming up the truck to loading and unloading to parking the vehicle. (Tr. 45-47). Along with her descriptions, Ms. Rhodes gathered information on how long each task took, compiling a total time required to perform the job. Based upon her interviews, Ms. Rhodes concluded that 1) employees' work hours were not being correctly recorded, and 2) employees were working over ten hours per day. (Tr. 47, 65). Ms. Rhodes cataloged the times provided by her interviewees in a report and used the times to estimate how long the average mail runs took to complete. (Tr. 48-50; JX 1).³ To compute the averages, Ms. Rhodes added the times provided by her interviewees and divided by the number of interviewees.⁴ (Tr. 52-53).

The average early run time, as reported by Ms. Rhodes' interviewees, was 11 hours 40 minutes. (Tr. 53). On days where fueling was required, the run took 12 hours 10 minutes to complete. (Tr. 53). For the late run, the average run time was 12 hours 10 minutes on non-fuel days and 12 hours 40 minutes on fuel days. (Tr. 53). Ms. Rhodes testified that, after her interviews, she concluded that the employees had been informed to only put down 10 hours per run, no matter how long the job took. (Tr. 104-05, 114-16).

Beyond computing the average time for the mail runs, Ms. Rhodes received and reviewed the time cards of her four interviewees. Ms. Rhodes determined that, during the period under investigation, Groberg Trucking utilized three different time-keeping systems. (Tr. 59). Under the first system, employees recorded both their "in" and "out" times on a time card. (Tr. 59; CX 1, p. 20). Although the employees hand wrote their time totals, each employee always recorded 10 hours of employment per run. (Tr. 59). Beginning in March 1999, Groberg Trucking issued pre-printed time cards. The pre-printed time cards supplied a standard "in" and "out" time for each driver. The time cards required only that the drivers sign them. (Tr. 60; CX 1, p. 18). Beginning in September or October 2000, Groberg Trucking issued another time card system.⁵ In the final system, the time cards provided a standard "in" time, but the employees were required to write the "out" time of their run.

Ms. Rhodes received time cards from March 1, 1999 to October 31, 2000 for John Meier. (Tr. 58; CX 1). Mr. Meier's 38 time cards reveal 286 days of truck driving for Groberg Trucking.

³ Ms. Rhodes testified to two discrepancies in her report. First, the time provided by the U.S. Postal Service in the contract to arrive in Cheyenne, Wyoming on the early run is 6:10am, not 6:45am as reflected in the report. (Tr. 51). Second, the contract time for the late run arrival in Rock Springs is 1:30am, not 1:40am as stated in her report. (Tr. 51). Ms. Rhodes testified that neither of the discrepancies affect her route estimates for the employees as she did not use the U.S. Postal Service's contract times to compute the average total hours worked. (Tr. 52).

⁴ Of her four interviewees, three provided information on the early run, whereas all four interviewees provided times for the late run.

⁵ Ms. Rhodes testified that she never received time cards for September 2000. (Tr. 61-62).

(CX 1, p. 1-20). Every day, without exception, Mr. Meier recorded ten hours of work. The lone anomalous entry in his time records is on June 11, 1999, when Mr. Meier entered an additional 15 minutes of "late slip" time. (CX 1, p. 17). The additional time, however, is not recorded in the "Regular Total Hours" category.

The 35 time cards for Richard Kranz, representing 207 days of truck driving employment from July 1, 2000 to February 28, 2002, demonstrate that Mr. Kranz always reported 10 hours of work per day, without exception. (Tr. 63; CX 2).

Joseph DiJohn's 10 time cards cover the period from September 1, 1999 to January 31, 2000, and they reflect 67 days of truck driving for Groberg Trucking. (Tr. 63; CX 3, p. 1-10). All of Mr. DiJohn's time cards were produced during Groberg Trucking's second time-keeping system under which all times were pre-printed. (Tr. 63; CX 3). Like the time cards of Messrs. Meier and Kranz, Mr. DiJohn's time cards "in" and "out" times are identical and his total time for each run is 10 hours exactly. (Tr. 64; CX 3).

Ms. Rhodes also received a document from Larry Eckholm showing that Groberg Trucking's trucks were governed at 65 miles per hour (hereinafter "mph"). (Tr. 65; JX 3). Ms. Rhodes explained that the fact that the trucks were governed supported her determination that employees were not recording or being paid for all of their work time. (Tr. 67). She explained that the round trip mileage from Cheyenne to Rock Springs was 530 miles. (Tr. 68). Ms. Rhodes testified that a driver, maintaining a consistent speed of 65 mph, would need over eight hours simply to traverse the distance. (Tr. 68). She identified numerous factors that added time to the trips, including: 1) driving through cities at reduced speeds, 2) driving over uphill climbs, 3) traffic slowdowns on the interstate, and 4) weather. (Tr. 68-69). Ms. Rhodes explained that the Department of Labor uses 55 mph as a "rule of thumb" for the speed at which individuals can cover distances considering the various factors she highlighted.. (Tr. 69). At 55 mph, the 530 mile round trip would take approximately 9 hours 30 minutes to simply drive, she estimated. (Tr. 69).

After her interviews, she received a personal log kept by John Meier of his start and stop times. (Tr. 65, 69; CX 4). Mr. Meier kept the time log from July 21, 2000 until August 14, 2000. (Tr. 70; CX 4). From the log, Ms. Rhodes again concluded that 1) Mr. Meier was working more than 10 hours per day, and 2) there were duties outside of just driving the truck that were not being recorded on the time cards. (Tr. 71). Of the 11 runs represented in Mr. Meier's log, Ms. Rhodes identified no run performed in under 10 hours. (Tr. 74). Two runs were early runs, and nine runs were late runs. (Tr. 74). Computing the runs to the one-hundredth hour, Ms. Rhodes identified run time totals of 13.02, 12.39, 12.74, 12.32, 13.3, 14.18, 13.65, 12.68, 13.37, 12.58, and 12.38 hours. (Tr. 73-74).

During her investigation, Ms. Rhodes also contacted that United States Postal Service (hereinafter "USPS"). (Tr. 74). She explained that she is required to notify contracting agencies when a carrier is being investigated. (Tr. 74-75). From contracting officer Paul Welch, Ms. Rhodes received several documents. (Tr. 75).

First, Ms. Rhodes received a copy of the contract between the USPS and Groberg Trucking. (Tr. 75; JX 4). The contract contains an early and late run schedule. Ms. Rhodes testified that she did not know the exact reason for the schedule's provision in the contract, but she stated that she assumed that the post office expected contracting parties to deliver the mail within the time allotments on the schedule. (Tr. 77). For the late run, the USPS contract provides a running time of 11 hours 20 minutes. (Tr. 78). For the early run, the contract provided a running time of 11 hours 40 minutes. (Tr. 79). Ms. Rhodes explained that the USPS times did not consider time spent loading and unloading at the designated post offices. (Tr. 79). Rather, at the bottom of the form, the USPS estimated that loading and unloading efforts added 70 minutes to the late run and 35 minutes to the early run. (Tr. 80). Thus, both runs take over 12 hours to complete as provided by USPS estimates. (Tr. 80). Ms. Rhodes testified that the USPS figures influenced her investigation because it confirmed the necessity to complete tasks other than driving and that the job required more than 10 hours to complete. (Tr. 80, 82). She trusted the figures provided by USPS. She testified, "I was thinking...that the Postal Service isn't going to provide a really outrageous number of hours because they're paying for the service." (Tr. 80-81). However, she did not rely upon the USPS estimates when computing back pay. (Tr. 81-82).

Second, Ms. Rhodes received copies of three wage determination letters, representing the wages in effect at various times throughout the investigation period. (Tr. 75).

To compute back pay owed, Ms. Rhodes simply used the averages she derived from her employee interviews.⁶ (Tr. 81, 83). She did not factor in time spent during road construction delays, traffic back-ups, weather delays, or truck maintenance when computing time worked. (Tr. 82-83). In total, Ms. Rhodes determines that 14 employees were owed back wages from the period of August 1998 to August 2002. (Tr. 81, 83-84). Ms. Rhodes's original investigative period was from August 1998 to August 2000, but she testified that the evidence revealed that the company's pay practices had not changed. (Tr. 83-84). Ms. Rhodes simply applied the same averages over the additional time period during which the time cards revealed further violations. (Tr. 84). She testified that the time cards of Ron Martin and Charles Liesenfeld from January 2002 to August 2002 revealed a similar pattern of uniform "in/out" times and total hours. (Tr. 84-85; JX 10-11). When asked to specifically recount her calculations, Ms. Rhodes testified:

Well for each period of time during which a specific wage rate was due, for example, from August of 1998 through June 30th of 1999, the wage rate was \$15.30 an hour; for that period of time, for each employee, I would count the number of early runs that they did and the number of late runs that they did, because each involved a different amount of time that needed to be compensated. Then for the early runs, if someone for example, had done sixty early runs, I would assume that thirty of those, they fueled after the run and thirty of them, they didn't fuel after the run. And on the early run, the amount of unpaid time was 1

⁶ Ms. Rhodes testified that this does not include Mr. Meier's personal log. (Tr. 83).

hour and 40 minutes, unless it was a fueling day. And then it was 2 hours and 10 minutes. So I simply multiplied the number of runs by the uncompensated hours to come up with a total number of uncompensated hours, and then applied the correct wage to that to come up with the back wages.

(Tr. 86-87; JX 5). Ms. Rhodes's calculation spreadsheets and totals are contained in the record. (JX 5, 7).⁷ Her final total of back wages owed totaled \$94,578.51. (JX 7).

Following her investigation, Ms. Rhodes spoke to Mr. Groberg and reviewed her findings with him in October 2000. (Tr. 98). She also followed up their conversation with a letter. (Tr. 98). The letter included copies of the back wages calculations and a copy of the applicable regulations. (Tr. 99). She did not recall any specific discussion concerning the technicalities of future compliance with the Act. (Tr. 99).

As a result of Ms. Rhodes's investigation, the USPS withheld the amount of back wages due from the contract payments due Groberg Trucking. (Tr. 100; JX 8).

C. Description of Mail Routes and Driver Testimony

United States Postal Service Contract No. 82036 involves the transportation of mail between Cheyenne and Rock Springs, Wyoming twice daily. The following is a description of each route and summaries of the testimony from the drivers of the routes.

1. Early Run

The early run is scheduled to depart the post office in Cheyenne, Wyoming at 6:30pm and arrive in Rock Springs, Wyoming at 12:00am. (JX 4). The driver then leaves Rock Springs at 12:15am and arrives in Rawlins, Wyoming at 2:40am. After loading and unloading mail, the contract calls for the truck to depart the post office in Rawlins at 2:50am and return no later than 6:10am the next morning to the post office in Cheyenne.

⁷ After Ms. Rhodes prepared her calculation documents, she became aware that the incorrect wage rate had been paid to Groberg employees from August 1998 through June 30, 1999. (Tr. 95-96). Accordingly, Ms. Rhodes computed the difference between the \$15.30 per hour wage to be paid and the \$15.06 per hour that was actually paid. (Tr. 95-96). Groberg Trucking's incorrect wage for that time period affected 6 employees, and Ms. Rhodes simply multiplied the difference in wages by the number of hours worked by the 6 employees during that time period. (Tr. 96-97; JX 6).

2. Late Run

The late run is scheduled to depart the post office in Cheyenne, Wyoming at 7:50pm and arrive in Rawlins, Wyoming at 11:05pm. After unloading and loading mail, the driver is to depart Rawlins at 11:15pm and arrive in Rock Springs, Wyoming at 1:40am. After unloading, the driver is free until 9:15am the following morning, when he is scheduled to depart Rock Springs. The contract then requires the driver to arrive back at the post office in Cheyenne by 2:45pm.

3. Fueling Days

The trucks of Groberg Trucking are fueled every other day. The drivers' testimony is consistent that fueling a truck during or after a run adds 30 minutes to the average run.

4. Driver Testimony

a. Richard Kranz

Richard Kranz worked for Groberg Trucking from July 2000 to February 2002. (Tr. 140). He worked as a relief driver, filling in for the two regular drivers on their days off on the week-ends. (Tr. 140). He quit Groberg Trucking in 2002 after a dispute with his supervisor, Chuck Liesenfeld. (Tr. 157). Kranz has driven a truck since 1974. (Tr. 137).

Describing his normal routine at Groberg Trucking, Kranz stated that trucks were picked up at Total Truck Stop at the beginning of every shift. (Tr. 157). Upon arrival, Kranz would perform a "walk-around" of his truck, inspecting the oil, water, belts, power steering, transmission, and tires. (Tr. 172-74). He performed such an inspection before, once during, and at the end of his run. (Tr. 172). He estimated that the inspection took fifteen minutes to complete. (Tr. 172). For the inspection during his run, they were briefer, consisting of visually checking the lights and tires. (Tr. 174). Every other day, he stated, the trucks were fueled at SAPP Brothers Gas Station. (Tr. 157). He provided that the truck stop and gas station were approximately ten miles apart. (Tr. 157).

Mr. Kranz testified that his supervisor, Chuck Liesenfeld, instructed him on completing his time cards. (Tr. 142, 164-65; CX 2, p. 1-35). Under direct examination, Kranz was questioned as to why each of his time cards reflected the same amount of time.

Q: Now why is that?

A: Well, we only got paid for driving time. Nothing else.

Q: Okay. Were you instructed to record 10 hours?

A: Yes.

Q: Okay. What would've happened if you had recorded more than 10 hours?

A: Chuck [Liesenfeld] would've handed it back to me and made me redo it, which he did.

Q: And why would he do that?

A: Because he said that we could only put in driving time, period. For 10 hours, period.

Q: Okay. And you said that you actually attempted at times to record more than 10 hours?

A: If it was a weather day that I got delayed a lot, yes.

Q: And would he actually pay you for that time?

A: I don't recall.

Q: Never did?

A: Not that I recall.

(Tr. 143-44). Upon cross-examination, Mr. Kranz testified that Chuck Liesenfeld told him to write down 10 hours for every run "no matter what," and that, should he put something else down, he might have to look for another job. (Tr. 165-66). Mr. Kranz clearly stated that the time cards did not reflect the actual hours he worked on the mail hauls. (Tr. 144).

Kranz testified that, when he spoke to Ms. Rhodes, he estimated that the early run took 11 hours 45 minutes, whereas the late run took 12 hours. (Tr. 146-47). He explained that these times were for a "good day" and included driving, checking the truck, and leaving the post offices. Kranz did not remember the mail runs ever being completed in times faster than he gave Ms. Rhodes, unless there existed a strong tail wind. (Tr. 149). He provided that the difference with the tail wind was not large, but he did comment on the frequency in which he drove in such a wind. Kranz also testified that his estimates to Ms. Rhodes did not include fueling time for the trucks which he estimated at 30 minutes. (Tr. 168). He further stated that SAPP Brothers was the only place the drivers could fuel their trucks because it was the only gas station where Groberg Trucking has a gas account. (Tr. 168).

Kranz explained that a variety of factors could slow down a mail run, including construction, severe weather, heavy traffic, and accidents. (Tr. 149-56). In 2000 and 2001, Kranz testified that he knew of four different construction projects on Interstate 80. (Tr. 149). He also

stated that the weather could produce snow, ice, and high winds, sometimes producing whiteout conditions. (Tr. 151). He had experienced four road closures during his time at Groberg Trucking. (Tr. 153-55). Twice he was able to drive an alternate route. (Tr. 155). He also stated that accidents forced him to a complete stop twice. (Tr. 156).

Kranz again testified that, when he attempted to put more than 10 hours on his time card to reflect the delays above, Chuck Liesenfeld would not allow him to do so. (Tr. 156).

b. John Meier

John Meier worked for Groberg Trucking from March 1999 to October 2000. (Tr. 177). He was hired by his original supervisor, Larry Eckholm. (Tr. 228). Eckholm took Meier on a training run, but he did not instruct Meier on how to chart his hours. Eventually, Chuck Liesenfeld became his supervisor. (Tr. 229). Meier left the company when his hours were reduced. (Tr. 177).

Meier gave detailed descriptions of the two different mail runs.

For the early run, he came to work at 5:30pm at the Total Truck Stop. (Tr. 186). First, he put his gear into the truck and performed a motor vehicle inspection by checking the truck's fluids, lights, engine, belts, and tires. (Tr. 187-89). Next, he would crawl under the trailer to inspect the brake system. (Tr. 188). He estimated that the inspection took 15 minutes. (Tr. 189). After the inspection, he would drive to the Cheyenne post office. (Tr. 189). The trip took approximately fifteen minutes, causing him to arrive at the post office at approximately 6:00pm. (Tr. 190). Meier would back the truck up to the loading dock, park, secure the breaks, and start loading the mail. (Tr. 190). To do this, he would roll containers of mail into the truck and fasten them to the sides of the trailer. (Tr. 190-91). Once the mail was secure, he would shut the trailer door and post office personnel would provide him with the necessary paperwork and place a seal over the door. (Tr. 191). Meier would normally depart from the post office at approximately 6:30pm. (Tr. 191). From there, he would proceed to drive through town to Interstate 80. (Tr. 192). He testified that, during his drive on the interstate, he averaged about 58 to 60 mph considering slow downs for hills and construction. (Tr. 193). He stated that the top speed for the truck was 65mph as it was governed. (Tr. 192-93). He would normally arrive at the Rock Springs Post Office around 11:00pm to 11:30pm, although he also stated that weather conditions would sometimes slow him down. (Tr. 193-94). Once at the post office, he would pull into the loading dock, set his breaks, unhook the air lines, disconnect the trailer, and drive out from underneath it. (Tr. 199). Next, he would drive over to another trailer and hook up to it. (Tr. 199). He would inspect the new trailer and the tires and lights. (Tr. 199). He would then inform the post office he was there and wait for the mail to be prepared. (Tr. 200). Once prepared, he would load the mail containers on and check to see if he needed to pick up any registered mail. (Tr. 200). Meier testified that he left the Rock Springs Post Office at approximately 12:00am to 12:15am. (Tr. 201). He would then drive to the interstate and take it to Rawlins. (Tr. 201). At the Rawlins Post

Office, the same loading/unloading procedure would occur. (Tr. 202-03). He estimated that it took a minimum of 15 minutes to load/unload and, then, another 10 minutes to disembark and get back out to the interstate. (Tr. 203). Once on I-80, he would head back to Cheyenne. (Tr. 203). He would arrive at approximately 5:00am at the Cheyenne Post Office. (Tr. 204). Once there, the same unloading procedure occurs. (Tr. 204). He testified that he would normally finish unloading at 5:15am. (Tr. 204). He would then once again check the lights and tires, and proceed to the Total Truck Stop. (Tr. 204-05). He stated that he would arrive at the truck stop at 5:30am. (Tr. 205). When the truck needed to be fueled, he took it to SAPP Brothers Truck Stop. (Tr. 205). Driving to the gas station, fueling, and returning added 30 minutes to his run. (Tr. 206-07).

For the late run, Meier testified that his shift began at 6:50pm at the Total Truck Stop. (Tr. 208). He followed the exact same preparation and inspection procedures as the early run. (Tr. 208). He testified that the inspection took the same amount of time also – 15 minutes. (Tr. 208). After his inspection, he would drive from the truck stop to the Cheyenne Post Office. (Tr. 209). Again, Meier testified that the trip took fifteen minutes. (Tr. 209). Once at the post office, he performed identical docking, parking, and loading/unloading tasks to the early run. (Tr. 209-10). He estimated that the tasks took 30 minutes to perform. (Tr. 210). Once completed, he would leave the post office at approximately 7:50pm, drive to Interstate 80, and head towards Rock Springs Post Office. (Tr. 210-11). Whereas the early run stopped in Rawlins on the return trip to Cheyenne, the late run stopped in Rawlins on the way to Rock Springs. (Tr. 211). After Meier pulled off I-80, he estimated that it took him 10 minutes to arrive at the Rawlins Post Office. (Tr. 211). He testified that he followed the same loading/unloading procedures he performed on the early run in Rawlins, and he estimated that it took a minimum of 15 minutes to perform. (Tr. 211). After leaving the Rawlins Post Office, it took him 6 to 7 minutes to return to the interstate where he would proceed on to Rock Springs. (Tr. 212). Meier usually arrived at Rock Springs around 1:00am. (Tr. 212). Upon arrival, he would dock his trailer, unhook the truck from the trailer, pull out into the parking lot, and go to sleep. (Tr. 212-13). He testified that he would go to sleep in the sleeper cabin of the truck usually around 1:15am. (Tr. 213). Between 8:00am and 8:30am, he would awake, and then he would go into the post office, clean up, return to his vehicle, and check the tractor, fluid levels, and tires. (Tr. 213). Once the mail from Salt Lake City arrived, Meier would hook his truck up to the appropriate trailer and start the loading process. (Tr. 214-15). Meier normally left Rock Springs at 9:15am. (Tr. 215). He would drive to the interstate and head toward Cheyenne. (Tr. 215). There were no scheduled stops along the way. (Tr. 215). He testified that he normally arrived at Cheyenne around 2:00pm. (Tr. 215). Once there, he would dock his truck, park, secure the breaks, find someone in the post office to cut the seal, and unload the mail. (Tr. 216). He estimated that unloading took 15 minutes. (Tr. 216). Once unloaded, he would check the truck's tires and lights, depart from the post office, and head to the Total Truck Stop. (Tr. 216). Meier stated that the trip to the truck stop from the post office took 15 minutes. (Tr. 216). He would end his run at the truck stop at 2:30pm. (Tr. 216). If he needed to fuel the truck, however, his run would not end until 3:00pm. (Tr. 217). Meier explained that the late run took 12 hours 15 minutes to complete on a non-fuel day and 12 hours 45 minutes on a fuel day because the late run driving occurred in more day-time traffic. (Tr. 218). His estimates of time did not factor in weather or significant traffic delays. (Tr. 219).

Meier testified to several factors that slowed down his mail runs. During the winter months, he stated that he was slowed by weather conditions 25 to 30% of the time such as ice, snow, and wind. (Tr. 194-95). In whiteout conditions, Meier testified that he could only drive 25 to 30mph. (Tr. 195). Once, a road closure delayed him for 26 hours, although he was still paid for 10 hours of work. (Tr. 196-97).

After speaking to WHD investigator Diane Rhodes, Meier kept a personal log of his mail runs from July 21, 2000 to August 14, 2000. (Tr. 221; CX 4). The handwritten log tracked various factors, such as Meier's location, the odometer reading, the specific run, the specific task he was performing, time, and date. (Tr. 220; CX 4). As he performed each task, such as loading, inspecting, etc., he charted the time with his wrist watch to the exact minute. (Tr. 220).

Although he always filled out 10 hours per run on his time cards, Meier testified that it took more than 10 hours to complete the runs. (Tr. 180-81; CX 1). He stated that the time cards did not reflect his actual work times, but rather mere approximations. (Tr. 181). Mr. Meier even testified that two of the time cards, which were filled out by hand, were not completed by him. (Tr. 183; CX 1, p. 19-20). When asked what would have happened if he had recorded more than 10 hours for any run, Meier responded, "I would think that I would probably be exposed to some kind of disciplinary action." (Tr. 184). Meier explained, "Well when I first went to work there, I was told that I would get paid for 10 hours of work, and this is the job that we do. And I didn't feel that it would be to my benefit to disrupt that condition of my...employment." (Tr. 184). Meier further stated that he didn't want to "rock the boat," so he never complained. (Tr. 231-32).

c. Joseph DiJohn

Joseph DiJohn worked for Groberg Trucking from September 1999 to January 2000. (Tr. 258). DiJohn was hired by Chuck Liesenfeld, and Liesenfeld took him on one training run. (Tr. 274-75). DiJohn testified that Liesenfeld told him that drivers were paid \$190 per run. (Tr. 262, 276). DiJohn never complained about the pay because he was unaware that the drivers were paid on an hourly rate. (Tr. 279).

Mr. DiJohn drove both runs, and he testified that there was no "memorable difference" between the early and late runs. (Tr. 277). DiJohn figured out that Groberg Trucking estimated the runs to take 10 hours, but he testified that neither run could be completed in that time. (Tr. 262-64). While he stated he was never paid for more than 10 hours of work, he said the runs took 11 hours to complete, with an additional 15 to 30 minutes if fueling was required. (Tr. 277).

Other factors lengthened trips, according to DiJohn, such as waiting for fuel, repairs, and bad road conditions. (Tr. 264).

He testified that I-80 was "treacherous" in the winter due to wind, snow, and ice. He stated that such conditions sometimes produced whiteout conditions. (Tr. 265). Under such

conditions, DiJohn was forced to drive slowly to avoid danger; he stated that he could drive “[a]nywhere from 30 miles an hour to whatever is safe.” (Tr. 266). DiJohn testified that U.S. Highway 30 was an alternate route if interstate conditions were too bad. (Tr. 266). While he stated that the alternate route was not too much longer, he stated it was slower. (Tr. 266).

DiJohn was also required to take his truck in for repairs on 2 or 3 occasions during his four months of employment. (Tr. 268-69). He stated that routine maintenance was performed at SAPP Brothers or at Lariat International, and, although the maintenance could take hours, he was never compensated for his time. (Tr. 268-70).

During his entire employment, I-80 had long stretches of road construction which forced speeds down to between 45 to 55mph. (Tr. 266-67).

DiJohn’s time cards were always completely pre-printed, and he was only required to sign at the bottom. (Tr. 271; CX 3). Although the time cards did not reflect his actual work times, he was never advised that he could change them. (Tr. 272, 281). DiJohn testified, “Really there was nothing to complete. It was just you signed it and turned it in to Chuck.” (Tr. 271). DiJohn explained that the trucking industry was “different” in that a driver only got paid for the time driving the truck. (Tr. 272-73). He stated that everything else was a “freebie.” (Tr. 272-73, 278-79).

He stopped working after an accident convinced him that his deteriorating night vision prevented him from driving safely. (Tr. 258-59).

d. Charles Liesenfeld

Since 1997, Charles Liesenfeld has worked for Groberg Trucking. (Tr. 422). He started as a driver for the company, but he now works as a supervisor and driver. (Tr. 422). As a supervisor, Liesenfeld performs numerous duties: 1) creates work schedules, 2) handles personnel issues such as hiring/firing and worker orientations, and 3) liaisons between the company and the U.S. Postal Service. (Tr. 422-23). Liesenfeld continues to be a regular driver, driving Monday through Friday. (Tr. 423).

Concerning his training of new employees, Liesenfeld testified that he tells the employees how the mail runs pay. (Tr. 424). He stated, “I do also inform them of what our pay, how we pay. How ever many a run takes, you put it on your time card. And anything over 10 hours you put down and you’ll be paid for.” (Tr. 424, 452). Liesenfeld testified that he was told the same thing when Ron Martin hired him. (Tr. 424). He added, however, that Martin informed him that, if the hours reported became excessive, “it will be looked at.” (Tr. 424).

Liesenfeld provided detailed descriptions of the required tasks for the early and late runs and the time required to perform them.

On the early run, Liesenfeld testified that he began work at the Total Truck Stop at 5:30pm. (Tr. 426). He spent 15 minutes warming up and inspecting the truck, and then drove for another fifteen minutes to the Cheyenne Post Office. (Tr. 426). Once at the post office, he backed into the dock, parked, slid the ramp down into the truck, and rolled the mail onto the truck, usually by himself. (Tr. 426-27). He stated that loading took between 20 and 30 minutes. (Tr. 427). After he shut the trailer door and a post office employee sealed it, he would depart. (Tr. 428). Liesenfeld stated that he left the post office at 6:30pm. (Tr. 428). From there, he proceeded to Interstate 80. He estimated that it took 10 minutes to reach the interstate. (Tr. 428-29). Once on the interstate, Liesenfeld drove straight to Rock Springs, arriving between 10:30pm and 11:00pm, depending on the “variables – wind, ice, snow.” (Tr. 429). Upon arrival, Liesenfeld stated that he docks the trailer, checks the tires, drops his landing gear, disconnects the truck from the trailer, and then waits until the dispatch time of 12:15am. (Tr. 432). From his arrival between 10:30 and 11:00pm until the dispatch time, Liesenfeld stated he was free to do what-ever he wanted, such as eating or, in his case, visiting his girlfriend. (Tr. 432-33). However, Liesenfeld added that a driver needed to show back up 15 minutes before the dispatch time of 12:15am to reconnect the truck and trailer, raise the landing gear, sign for the registered mail, strap the mail in, drop the trailer door, and allow post office personnel to seal the door. (Tr. 434). While the official dispatch time was 12:15am, Liesenfeld testified that the post office did not always hold him that long. (Tr. 435). He estimated that 5 out of 7 days he left the post office early. (Tr. 435). When he left the post office, he returned to the interstate and headed east towards Cheyenne. (Tr. 435). On the way to Cheyenne, he stopped in Rawlins. (Tr. 436). Once stopped at the Rawlins Post Office, post office personnel broke the seal, and he then opened the trailer door, loaded and unloaded the necessary mail, strapped in new mail, closed the door, and had it resealed. Liesenfeld estimated that it took 10 minutes total. (Tr. 436). After he departed, he would continue on to Cheyenne, arriving there between 4:00am and 5:30am. (Tr. 438). Upon arriving in Cheyenne, he docked the truck, had the seal cut, opened the trailer door, unstrapped the mail containers, and unloaded the mail. (Tr. 438). He estimated that it took 10 minutes to unload. (Tr. 438). After unloading, he lifted the ramp, closed the door, and drove back to the truck stop. (Tr. 438). In total, Liesenfeld testified that the early run required 8 hours to 8 hours and 30 minutes of driving time, although he also stated that the driving could take 10 to 12 hours depending on the road conditions. (Tr. 437). For total run time, he estimated 9 hours to 9 hours 30 minutes. (Tr. 445-46). If he was required to fuel the truck, he estimated the total run time to be 10 hours. (Tr. 445-46).

Liesenfeld testified that wind, ice, and snow were factors that could delay a trip. (Tr. 429). He stated that whiteout situations occur occasionally, and, although he tries to keep driving, he has been forced to slow down or stop. (Tr. 429-30). He also discussed construction as a factor that can slow a driver down, and he testified that he has been slowed down twice in five years by accidents. (Tr. 430-31).

Liesenfeld testified that there were no significant differences between the early run and the late run, except for the late run’s layover in Rock Springs. (Tr. 446-47). He would arrive at the

Total Truck Stop at 6:45pm, leave the Cheyenne Post Office for Rock Springs at 7:50pm, arrive at Rock Springs at 12:30am, and drop off the trailer. (Tr. 448). After that, he was off duty until the next morning. (Tr. 448). He would come back to the post office at 9:00am, hook up the truck, check the truck's tires, open the trailer door, load the truck, strap in the mail, close the door, have it sealed, and leave. (Tr. 449-50). Liesenfeld testified that he left the Rock Springs Post Office at 9:15am and arrived in Cheyenne between 1:30pm and 2:00pm. (Tr. 449-50). He estimated that the total work time on the run was 9 hours 30 minutes to 10 hours with 20 to 30 minutes extra if fueling was required. (Tr. 450). He again referenced wind and road closures as factors that could extend the time required for the run, although he testified that road closures occurred only 2 to 3 times per year. (Tr. 453).

Mr. Liesenfeld never recalled any driver complaining about the time required to perform the runs. (Tr. 451). Rather, he said the current investigation was a "conspiracy among disgruntled employees," and he found the whole investigation ridiculous. (Tr. 471). He testified that he would return any back wages he was awarded to Mr. Groberg. (Tr. 472).

Chuck Liesenfeld's time sheets from January 1, 2002 to August 15, 2002 are in the record. (JX 10). On the 15 time sheets in the record, Mr. Liesenfeld recorded 10 hours of work every day without exception.⁸ The only additional time recorded was separately entered "late slip time."

e. Ronald Martin

Ronald Martin has worked as a driver for Groberg Trucking for the past six years with the exception of an 18-month period in 1999 and 2000 when he worked for another company. (Tr. 477). After one year with the company, he was promoted to supervisor. (Tr. 478). After his return to the company in 2000, however, he worked solely as a driver. (Tr. 478). His supervisory responsibilities included creating work schedules, general paperwork, truck maintenance, hiring and firing, and training new employees. (Tr. 479-80).

When Martin was training new employees, he instructed them that they were paid for 10 hours of work per run, but, if the run took additional time, he instructed them to record the additional time. (Tr. 480, 484, 497). However, under cross-examination, Martin admitted that, during his deposition testimony, he stated that there would be consequences for a driver going over 10 hours per run if there was not a good reason to do so. (Tr. 498-99).

⁸ The daily totals for Mr. Liesenfeld's time sheet for April 1, 2002 to April 15, 2002, are not readable. (JX 10, p. 9). I have concluded that the 8 days of employment represented on the time sheet each total 10 hours of work per day, however, because the "in" and "out" time, which are readable, are identical to all other "in" and "out" times that Mr. Liesenfeld recorded on other time cards. For those day, Mr. Liesenfeld reported 10 hours of work. Thus, I credit Mr. Liesenfeld with 8 10-hour days from April 1, 2002 to April 15, 2002.

Martin estimated that the early run took from 8 hours 30 minutes to 10 hours to complete, depending on the day in which you are working. (Tr. 481). Other variables included weather and driver rest stops. (Tr. 481-82). Martin testified that road construction and road closures can slow or stop a run, stating he had been stopped “a couple times.” (Tr. 482-83). For the late run, Martin said that the run can be completed in 10 hours if the driver does not take any personal breaks and fuels the truck on the way into town if needed. (Tr. 486). He stated that he may have gone over 10 hours by 15 minutes sometimes, but he attributed that to taking personal breaks. (Tr. 486).

Martin testified that the weather never really affected him. When asked about snowy and icy roads, he stated, “Stay in the left lane and hammer down, you know. And then if for some reason they do close the roads, you just park it and go to bed.” (Tr. 482). When asked about driving during whiteout conditions, Martin stated, “Same thing, I just – you back out of it and stay in the left lane and keep rolling.” (Tr. 483). On cross-examination, Martin expounded upon his driving in poor weather conditions, stating:

Q: First of all, a whiteout is a condition where there’s so much snow in the air that you can’t see past the front of the truck. Is that right?

A: Pretty much. You can see maybe a foot or two in front of the hood, if you’re lucky.

Q: Okay. Now, and also during a whiteout you’re going to have snow accumulation on the road, too? There’s going to be some snow blowing across the road?

A: Across the road, yeah. Yes.

Q: And in some cases, you’re going to hit icy patches in the road, too?

A: Possible.

Q: Okay. And also parts of the road that you’re traveling on beyond Cheyenne and Rock Springs go over mountain passes?

A: Yes.

Q: And some of those passes are upwards to 7,000 feet?

A: Yes.

Q: Now, you testified that as you go through these road conditions we’ve just described – whiteouts, icy roads, snow over the road – that you’re really pushing it then, too; right?

A: Pretty much. I don't have to back off too much.

Q: Right. You're – in fact, I think what you said was you put it in the left lane and you put the hammer down and you go?

A: Yes.

Q: Okay. And it's under those conditions, when you put the hammer down or when you're pushing it, that you can do the late run in less than 10 hours?

A: No. You can – I mean, I – if I can do it in those conditions, I mean, that's – somebody else, it might take – well, I can't testify to what another driver's – you know, he feels comfortable doing it, but.

(Tr. 496-97).

Martin testified that he never had a driver complain about the time keeping procedures at the company or the hours worked. (Tr. 484). At the end of his testimony, Martin stated that he would repay any wages he won to Mr. Groberg and that he has come to that conclusion of his own volition. (Tr. 502-03).

Mr. Martin's time sheets from January 1, 2002 to August 15, 2002 are included in the record. (JX 11). On the 15 time sheets in the record, Mr. Liesenfeld recorded 10 hours of work every day without exception. The only additional time recorded were separate entries for "late slip" time and maintenance time.

f. Mark Simmons

Mark Simmons has worked for Groberg Trucking since December 2000 as a relief driver. (Tr. 504). His supervisor is Chuck Liesenfeld. (Tr. 506). Liesenfeld took Simmons on a training run when he started work. (Tr. 507).

Simmons drives both early and late runs. (Tr. 505). He estimated that it took 9 hours to 9 hours 30 minutes to complete the early run, although he stated it could be done in 8 hours 30 minutes on Sundays due to the lack of mail in Rock Springs on that day. (Tr. 507). He further stated that it was "very easy" to perform the run in under 10 hours, taking all 10 hours to perform the run only once himself. (Tr. 508). For the late run, he estimated that it took from 9 hours 15 minutes to 9 hours 30 minutes to complete the run. (Tr. 511).

Simmons also testified that weather conditions such as ice and snow can slow a driver down, as can road construction. (Tr. 511-12). He stated that a whiteout can stop you altogether, but he estimated that other weather conditions just slow a driver down and add one half-hour to the trip. (Tr. 511-12).

Simmons testified that it was clear that Groberg Trucking wanted the routes driven in ten hours. He stated:

A: They told me that the runs consist of 10 hours of run for the early run. And when we get to Rock Springs, there's a layover there. Then, you know, we get in the truck and come back. And consists of, you know, a 10-hour run.

Q: Were you told anything more about keeping track of your time?

A: Yes. They said if you do – if it takes you longer, mark it down on your timecard, you'll get paid for it. But if you do it – you know, each month, you know, that you're running over that 10 hour mark, you know, they – they'll look for, you know, another driver to consist of that.

Q: So it was clear to you that the employer, Goldberg, expected you to do the run in 10 hours?

A: Ten hours.

Q: But if that you took more than 10 hours, you ought to put it on your timecard?

A: Put it on your timecard and they'd pay for you.

(Tr. 506). Despite his testimony that he could have put down his actual times, Simmons stated that the times on his time cards do not reflect the actual times he worked. (Tr. 518; RX 16, p. 11).

5. Testimony of Kenneth Groberg

Kenneth Groberg is currently the president and sole owner of Groberg Trucking. (Tr. 325). Groberg Trucking grew out of Edward L. Rhodes Company (hereinafter "ELRCO"). (Tr. 327). ELRCO first received a mail run contract in Salt Lake City, Utah to transport mail from the Salt Lake City International Airport to the Salt Lake City Post Office. (Tr. 287, 326). Eventually, owner Edward L. Rhodes sold the company to J. R. Lawrence, for whom Mr. Groberg worked as an employee. (Tr. 326-27). In 1987, Mr. Lawrence decided to sell the contract back to Mr. Rhodes, but he sold the contract to Mr. Groberg after a last-minute offer. (Tr. 327). Thus, Mr. Groberg became a co-owner with Mr. Lawrence of ELRCO. (Tr. 327). In 1992, the company changed its name from ELRCO to Groberg Trucking and Mr. Groberg purchased Mr. Lawrence's portion of the company, making Groberg the sole owner of the company. (Tr. 328).

In August 1996, Groberg Trucking, Inc., entered into a contract for a Wyoming mail hauling job. (Tr. 337, 397). Before the company assumed the contract, a driver, Ron Martin, for the previous contractor contacted him. (Tr. 338). Martin had driven the route for 6 months and

wanted to continue driving it. (Tr. 338-39). Martin informed Groberg that it took 9 hours to 9 hours 30 minutes to drive the route. Next, Groberg drove each route himself twice, keeping a log of his times once he got in the truck. (Tr. 339-41). Groberg testified that the longest it took him to drive the routes was 9 hours 30 minutes; however, he later provided that he had not driven the routes since 1996. (Tr. 341, 398). From his test runs, Groberg concluded that paying drivers for 10 hours per run was fair. (Tr. 341). He stated, "I felt that if I give the guy more than what I figured it was worth to do it, that he would do me a better job." (Tr. 341).

Upon receipt of the contract, the U.S. Postal Service provided the company with a schedule for the two mail runs. (Tr. 344; JX 4). The schedule establishes deadlines for times by which the driver is due out from a post office. (Tr. 344). Groberg stated that the "due out" time was most important; a driver could be early in arrival, but never late in arrival or departure. (Tr. 343-46).

A component of some runs was fueling the trucks. (Tr. 387). For the entire time that the company worked under the Wyoming contract, the company had gas accounts at all Total Truck Stop Gas Stations along the route and at SAPP Brothers Gas Station in Cheyenne, Wyoming. (Tr. 387-88). Mr. Groberg allowed his drivers to fuel at either gas station, but he testified that most drivers preferred to fuel at SAPP Brothers because of a reward system operated by the station. (Tr. 388-89). For every gallon of fuel the drivers pumped into their trucks, a driver received a point. (Tr. 388). After accumulating enough points, the points could be spent like cash in the store for personal items for the truckers. (Tr. 388). Groberg liked the point system because he believed it helped employee morale and did not cost his company anything to participate in. (Tr. 389).

When the company started the Wyoming contract, Mr. Groberg provided the drivers with time cards similar to the ones the company had previously used. (Tr. 346). The time cards were totally handwritten by the employees. (Tr. 346). Groberg testified that he promised the drivers 10 hours per day, but he also stated that he instructed the men to record more than 10 hours per day if the run took more than 10 hours to complete. (Tr. 347). Although Groberg did not always meet with every driver, he informed the various supervisors over the years how he wanted drivers to fill out their time cards. (Tr. 347-50).

Mr. Groberg implemented a second time card system to accommodate a mentally-challenged employee who had been injured in a motorcycle accident. (Tr. 355-56). The second generation of time cards had the times completely pre-printed, but Groberg testified that he instructed the supervisors to inform the drivers that they could record more than 10 hours if the run took additional time. (Tr. 356).

Mr. Groberg changed the time cards again after a discussion with Diane Rhodes. (Tr. 357). Ms. Rhodes informed him that the cards could not be completely pre-printed for the drivers,

so Groberg began to only pre-print the starting time, leaving the finishing time to be completed by the driver. (Tr. 357-58). Groberg explained that he left the start time pre-printed so as to distinguish the late and early runs. (Tr. 357-58).⁹

Throughout the evolution of the time cards, Mr. Groberg recalled only one employee – John Connell – who recorded over 10 hours of time on his time card. (Tr. 395-96). Groberg explained that the extra time was for maintenance requested by Groberg. (Tr. 395). Groberg stated that he paid Connell for his time, and, furthermore, had never refused to pay an employee who recorded over 10 hours of work per day. (Tr. 396).

Mr. Groberg stated that no supervisor ever mentioned a problem in driving the routes in 10 hours or less. (Tr. 353). In addition, he said no employee driver ever raised the issue. (Tr. 355). Groberg only recalled two situations where drivers complained of working more than 10 hours on a run. (Tr. 354). The employees – Larry Eckholm and John Meier – were both caught in snow storms. (Tr. 351-54). When Larry Eckholm approached Groberg with his problem, Groberg called Paul Welch in Denver, Colorado about the situation. (Tr. 351). It was the first time Groberg had encountered this type of situation. (Tr. 351). Welch informed him that drivers could earn a maximum of 15 hours per day, per Department of Transportation rules, consisting of 10 hours of driving and 5 hours of duty work. (Tr. 351). Subsequently, Groberg passed on the news to his supervisors that drivers could record up to 15 hours if they were caught in a storm or otherwise delayed. (Tr. 351-52). Groberg explained that the 15-hour maximum rule from the Department of Transportation led to the “Groberg Trucking hourly rate policy,” which instructed drivers that, if the road is closed, take the truck to the nearest post office, leave it with a postal official, and then go about your personal business until the road re-opens. (Tr. 352).

In 2001, Mr. Groberg prepared a written work hour policy. (Tr. 392-93). Although it had not been written before, Groberg claimed that the policy was no different than the “word of mouth” policy the company previously enforced. (Tr. 393-94, 399). The policy provides:

All employees are to keep a time card as to the total hours worked. All employees will be paid the total hours that they record on the time card. Any work that you perform from the time that you arrive at work until you leave to go home should be recorded on the time card, if a [sic] explanation is in order please write in the space provided on the time card.

⁹ At the formal hearing, evidence was introduced that Groberg Trucking has recently implemented a fourth time-keeping system with trucks equipped with time-stamping machines. (Tr. 359-378, 383). Evidence of the new system was not timely received, and the evidence was admitted for the sole, limited purpose of demonstrating a new time-keeping system, not to demonstrate the reasonableness, or lack thereof, of the Department of Labor’s back pay calculations. (Tr. 374-78, 383). Under oath, Mr. Groberg testified that the fourth time-keeping system was implemented in direct response to the instant litigation. (Tr. 414).

1. Start time is when driver arrives at the truck ready to inspect and start and warm the truck.
2. Times that driver is on lunch break or off duty will not be paid for.
3. If road is closed, driver is to go [sic] the nearest post office and secure the mail with Postal official [sic] driver is than [sic] free to come and go as he pleases until the road is open at which time the driver should clock in on his time card and continue his rout.
4. When driver is attending to the truck such as fueling, repairs or driving to or from the Post Office this time should be recorded on the time card.
5. If an Employee falsifies a time card this will be ground for dismissal.

(RX 1). Groberg testified that he gave each driver a copy and put one copy in each truck. (Tr. 393).

Although the policy called for employees to record all hours worked, Groberg admitted under cross-examination that employees were not recording all hours worked. (Tr. 400, 414-15). In fact, Groberg admitted that the time cards were mere estimations of time, and he saw no change in the time cards once the written policy was created. (Tr. 400-01, 410). He testified:

Q: [E]mployees recorded the same in and out times and the same total hours on every single timecard day in and day out?

A: Correct.

(Tr. 402). Groberg saw no problem in recording mere estimations of time, stating, "I felt that I was giving more than the hours that they were actually working." (Tr. 415).

Groberg admitted, however, that some runs took 10 hours to complete as demonstrated by test runs performed by employees Chuck Liesenfeld and Ron Martin. (Tr. 403; RX 2). Of the 11 test runs performed by Liesenfeld and Martin produced in the record, 7 were completed in under 10 hours. However, if the same test runs had been completed on days in which fueling of the truck was required, 1 run would have been completed in under 10 hours, 1 run would have been completed in exactly 10 hours, and 9 runs would have taken over 10 hours to complete. (RX 2).¹⁰ Groberg testified that he never paid either Martin or Liesenfeld for over 10 hours of work on any of the test runs. (Tr. 403).

Groberg denied that he would fire an employee who habitually required over 10 hours to complete a mail run absent any extenuating circumstances such as poor weather, road conditions, traffic, etc. (Tr. 403-06). But, during his deposition testimony, Groberg testified,

¹⁰ The document recording the test run states, "Trucks are fueled every 2 days/Add 30 mins to time." (RX 2).

Q: If you had an employee that was consistently taking more than 10 hours to complete a run, what's going to happen to that employee?

A: If you consistently are taking longer than everyone else, we'll simply find someone else to do the job.

(JX 12, p. 145). At the hearing, Groberg stated that he did not say that he would replace the driver, but simply find another person to run the route. (Tr. 405-06). Groberg did not address what he would have the displaced driver do, but he quickly intimated that he would support a decision to fire the driver if the driver's supervisor so determined. (Tr. 406).

V. CREDIBILITY

Based on my review of the record, summarized above, I make the following credibility findings:

A. WHD Investigators

I found the testimony of investigators Diane Rhodes, Joi Lin Allen, and Michael Jones credible. The testimony of each was thorough, competent, and supported by documentary evidence. I grant their testimony probative weight.

B. Truck Drivers Richard Kranz, Mark Simmons, John Meier, and Joseph DiJohn

I also found the testimony of truck drivers Richard Kranz, Mark Simmons, John Meier, and Joseph DiJohn credible. Each appeared to present honest, consistent testimony. I found the testimony of John Meier to be especially probative concerning the specific duties and time requirements of the truckers. I grant slightly less weight to Richard Kranz's testimony concerning the flexibility of Charles Liesenfeld and company management regarding time cards, however, due to the conflicts between Kranz and Liesenfeld and the apparent resentment Kranz had for Liesenfeld and his management style.

C. Charles Liesenfeld

I found Charles Liesenfeld to offer credible, thorough testimony concerning the duties and time requirements of the early and late runs. Mr. Liesenfeld was cooperative on the witness stand and provided detailed answers to questions.

I pause to consider Mr. Liesenfeld's testimony concerning two issues. First, Mr. Liesenfeld was clear in his resentment over the investigation, stating that the case was a "conspiracy among disgruntled employees" and "ridiculous." Secondly, Mr. Liesenfeld stated that he would return any back wages he was awarded from the outcome of the case. Mr. Liesenfeld

was clear that he believed the runs could be completed in under 10 hours, although he previously testified that they could require up to 12 hours of work. (Tr. 437, 453, 471-73). He explained that his belief that the runs took no more than 10 hours informed his opinion about the investigation and his approach to any money he received. (Tr. 472-73). While Mr. Liesenfeld's opinion about the investigation and the length of time required to adequately perform his job is obviously favorable to his employer, I did not detect that his opinions manifested themselves in a pro-employer bias which detracted from his credibility.

D. Ron Martin

I found Ron Martin's testimony to lack credibility. Mr. Martin offered unbelievable testimony concerning his driving speed during whiteout conditions and contradictory testimony from his deposition testimony concerning punishing drivers who consistently reported over 10 hours of work time on any given run. Beyond his testimony, Mr. Martin offered little other substantive testimony, and I give his testimony little probative weight.

E. Kenneth Groberg

I found Mr. Groberg's testimony lacked credibility for several reasons. First, Mr. Groberg occasionally offered evasive answers. On cross-examination, Groberg was asked, "So in fact they didn't start recording actual hours worked?" His answer, "Well, it depends on what your definition of actual hours are?" (Tr. 401). Second, Mr. Groberg portrayed himself as a victim of an impossible-to-understand regulatory scheme. While the governing regulations are not models of clarity, Mr. Groberg's numerous meetings with WHD investigators and the investigators' numerous attempts to explain the requirements orally and in writing undermine Mr. Groberg's credibility and his ignorance of the law defense. Finally, Mr. Groberg's testimony concerning the return of awarded back wages from the second WHD investigation further strains his credibility. Groberg testified that his attorney recommended the plan of reclaiming the back wages, but Groberg denied instructing or recommending his employees to return the money. Groberg explained that the two employees who returned money were like family; however, Groberg's testimony that his attorney and his two "family-like" employees simultaneously and independently thought to return the awarded back wages without any prompting by the most likely intermediary link between the workers and the attorney – Groberg himself – is not believable.

For the above stated reasons, I grant Mr. Groberg's testimony less weight.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Service Contract Act of 1965 (McNamara-O'Hara Act), 41 U.S.C. § 351 et seq., requires employers to pay its employees minimum monetary wages and fringe benefits to be determined in accordance with the prevailing rates and fringe benefits for such workers in the locality in which the contract is to be performed on U.S. government contracts over \$2,500. 41 U.S.C. §351(a)(1-2). In addition, the implementing regulations require that each contracting

employer maintain certain payroll records, including the number of daily and weekly hours worked by each employee to ensure compliance with the Act. 29 C.F.R. §4.6. “The Act’s purpose is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment.” 29 C.F.R. § 4.104. Mail hauling contracts are specifically covered by the Act. 29 C.F.R. § 4.130(a)(31).

The Act provides for the debarment of contractors that violate its requirements. 41 U.S.C. §354(a). Thus, “[u]nless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded [to a violator] until three years have elapsed from the date of the publication of the list [as distributed by the Comptroller General] containing the [violator’s] name....” 41 U.S.C. §354(a).

A. Respondent Failed to Make and Maintain Accurate Time Records

The record keeping requirements under the Act require a respondent to maintain: (1) the correct work classification, rate of monetary wages paid and fringe benefits provided, and total daily and weekly compensation of each employee; and (2) the number of daily and weekly hours so worked by each employee. 29 C.F.R. §§4.6(g)(1)(ii-iii). The regulation further states that “[f]ailure to make and maintain or to make available such records for inspection and transcription shall be a violation of the regulations. . . .” 29 C.F.R. §4.6(g)(3).

I find the preponderance of the evidence establishes that Respondent violated the record keeping provisions of the Act and its implementing regulations by failing to keep accurate daily and weekly records of the actual time worked by Groberg Trucking drivers from August 1998 to October 2002. Richard Kranz, John Meier, Joseph DiJohn, and Mark Simmons testified that their work time was not reflected in their time cards. (Tr. 144, 181, 272, 281, 518). While Chuck Liesenfeld and Ron Martin did not state that their time sheets were inaccurate, they did testify to accomplishing the runs in under 10 hours while always recording exactly 10 hours of work. (Tr. 445-46, 450, 481, 486). Thus, their time sheets also fail to reflect actual work times. Kenneth Groberg also admitted that the time cards failed to reflect actual work time, but rather provided “mere estimations” of work time. (Tr. 400-02, 410, 414-15). He acknowledged that the time cards demonstrated that his employees recorded the same in and out times and the same total hours on every single time card day in and day out. (Tr. 402).

Although Groberg, Martin, Simmons, and Liesenfeld testified that employee drivers were instructed to record all hours of work, as stated in Groberg Trucking’s written policy, the evidence overwhelmingly contradicts their testimony. Even a casual scan through the employee logs contained in the record reveals one simple fact: every employee recorded 10 hours of work per

run, without variation.¹¹ It is inconceivable that employees were told and believed that they should record their actual time on the job, yet each and every driver recorded the exact same amount of time at work each and every day. I find the evidence uniformly demonstrates that the drivers understood to record 10 hours of work per run and no more.

I also find that no attempt was made to track hours worked, but, rather, employees were paid a flat rate regardless of the length of time their work took to complete. John Meier, Richard Kranz, and Joseph DiJohn testified that the company expected the route to be driven in 10 hours. (Tr. 143-44, 181-84, 262-64). Mr. Meier testified that he always recorded 10 hours of work and that he feared disciplinary action if he recorded over 10 hours of work per day. (Tr. 180-81, 184). Mr. Kranz testified that Chuck Liesenfeld told him to write down 10 hours for every run “no matter what,” and that, should he put something else down, he might have to look for another job. (Tr. 165-66). Mr. Kranz clearly stated that the time cards did not reflect the actual hours he worked on the mail hauls. (Tr. 144). Mr. DiJohn never knew he could make adjustments to his completely pre-printed time card, and he simply assumed he was only compensated for driving time. (Tr. 271-73, 281). The drivers’ time cards support their testimony. Mr. Meier’s time cards from March 1999 to October 2000 reflect 10 hours of work per work day without variation. (CX 1). Richard Kranz’s time cards from July 2000 to February 2002 reflect 10 hours of work per work day without variation. (CX 2).¹² Joseph DiJohn’s time sheets from September 1999 to January 2000 reflect 10 hours of work per work day without variation. (CX 3). Although Mark Simmons testified that drivers were instructed to record all of their time, he also stated that it was clear that Groberg Trucking expected the route to be driven in 10 hours. (Tr. 506).

Despite Messrs. Martin and Liesenfeld’s testimony that drivers were instructed to record their actual time if it took more than 10 hours to drive the routes, their time cards – uniformly reporting 10 hours per run - weigh in favor of the version advanced by Kranz, Meier, and DiJohn: Groberg Trucking demanded its drivers to record only 10 hours per run, regardless of actual driving time. (JX 10-11). Mr. Liesenfeld’s time sheets from January 2002 to August 2002 record 10 hours of work every day. (JX 10). Only late slip time added to his reported work times. Mr. Martin’s time cards from January 2002 to August 2002 record 10 hours of work every day with

¹¹ I have not included the limited number of times employees reported additional time due to “late slips” in this conclusion. Time reflected in late slips was not time for which the employee was requesting compensation as much as it was time excuses from the postal service. (CX 1, p. 17).

¹² On Mr. Kranz’s time card for January 1, 2002 to January 15, 2002, he recorded 5 days of work each day, totaling 10 hours of work. In his grand total, however, Mr. Kranz writes 50.25 hours as his total. (CX 2, p. 4). Seemingly in contradiction, he records 50 hours in a slot entitled “Regular Total Hours.” No explanation is given for the additional 15 minutes included in his handwritten total, nor is explanation proffered for the conflicting totals.

only three instances of additional time recorded for maintenance to the trucks and some miscellaneous “late slip” entries. (JX 11). The maintenance time entries were recorded as separate entries and not included in any daily time totals.

Furthermore, the hearing testimony and deposition testimony of Messrs. Martin and Liesenfeld evinces a “standard” 10-hour work day at Groberg Trucking. (Tr. 469). Both driver/supervisors testified that attention would be drawn to a driver who could not run the route in 10 hours. (Tr. 467-69, 499; JX 11, p. 11, 13; JX 14, p. 33).

It is inconceivable that a driver would take exactly the same amount of time each day to make a run, and depart and arrive at exactly the same time for every run. It is even more inconceivable that an entire fleet of drivers would do so. Had the employees been recording their true running times, then traffic, weather, and other conditions would not allow for the uniformity seen in the time sheets. As such, I find that the evidence is resoundingly clear that the Respondent violated the record keeping provisions of the Act by failing to maintain accurate daily and weekly time records for its employees.

B. The Department’s Estimate of Uncompensated Hours Worked by Groberg Trucking Employees and Calculation of Back Wages Due is Just and Reasonable

The record demonstrates that Groberg Trucking failed to keep accurate time records on a daily or weekly basis for its employees. Because the time records were inaccurate or missing, WHD investigator Diane Rhodes estimated the time it took to complete the early and late runs in her back pay calculations. To compute back pay, Ms. Rhodes utilized the time averages she computed from her interviews with four employees. (Tr. 81, 83). While she noted that the UPS contract times and Mr. Meier’s personal log confirmed the accuracy of her averages, she did not rely upon them when calculating average times to complete the early and late runs. (Tr. 81-83). Furthermore, she did not factor in time spent in the truck during road construction delays, traffic back-ups, weather delays, and truck maintenance in her average time calculations, citing the variability in those factors. (Tr. 82-83).

In the absence of a record of actual hours worked, it is the Department of Labor’s burden to prove the amount and extent of the work performed between August 1998 and October 2002 as a matter of just and reasonable inference. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *American Waste Removal Company v. Donovan*, 748 F.2d 1406, 1409 (10th Cir. 1984).

The employee bears the burden of proving he performed work for which he was not properly compensated. However, employers have a duty to keep accurate records. If employers do not keep accurate records the employee’s burden is extremely difficult. In order to prevent the employee from being penalized by the employer’s failure to keep adequate records, the Supreme Court held in *Anderson*

that an employee carries his burden by proving that he has “in fact performed work for which he was improperly compensated and...[producing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” Upon a showing, the burden shifts to the employer to produce evidence of the precise amount of work performed or to negate the reasonableness of the inference drawn from the employee’s evidence. If the employer does not rebut the employee’s evidence, then damages may be awarded even though the result is only approximate. The employer cannot complain that the damages lack the precision that would have been possible if the employer had kept the records required by law.

Donovan v. Simmons Petroleum Corp., 725 F.2d 83, 85-86 (10th Cir. 1983) (citations omitted) (quoting *Anderson*, 328 U.S. at 687).

I am satisfied that Ms. Rhodes’s time and back wages calculations, which are based on payroll and time sheet records and employee interviews, fairly represent the uncompensated time worked by Groberg employees and money owed by the Respondent.

Ms. Rhodes’s calculations are sufficiently explained in her investigative reports and hearing testimony, which demonstrate a well established pattern of inadequate time-keeping procedures by the Respondent. (JX 1-2, 4-7, 10-11; CX 1-4). Ms. Rhodes estimated times include time for driving, loading, fueling, and inspecting the trucks, each activity being supported by every driver testifying at the hearing. As stated, her calculations do not include time for variable factors such as time necessary for maintenance and delays caused by weather and traffic, although the preponderance of testimony at the hearing established that such delays commonly occur. Thus, Ms. Rhodes’s calculations are conservative, in that regard. In addition, her estimates are *below* the USPS estimates for the early and late runs. (JX 4).

Furthermore, Ms. Rhodes’s calculation of average run times in excess of 10 hours for the early and late runs comports with the evidence as a whole. Ms. Rhodes’s calculations were based upon estimated times provided by drivers Meier, DiJohn, Eckholm, and Kranz. The estimations she recorded are corroborated by the testimony of Meier, DiJohn, and Kranz. Furthermore, the evidence as a whole establishes that drivers routinely worked over 10 hours to complete the runs. Drivers Richard Kranz, John Meier, and Joseph DiJohn testified that the runs took over 10 hours to complete, while drivers Mark Simmons, Ron Martin, and Chuck Liesenfeld testified that the runs could be completed in under 10 hours. I find that the runs took over 10 hours to complete for the following reasons.

The evidence proves that the drivers’ responsibilities and time commitments were larger than merely driving the distances between the various post offices. Drivers were required to inspect the truck for safety measures, load and unload mail, pick up registered mail if necessary,

communicate and work with post office officials along the routes, and fuel the trucks. This finding is supported by every driver who testified at the hearing. Several drivers also testified about maintenance responsibilities for the trucks, including waiting at service stations for repairs to be made. The time required by these additional duties, in addition to the time required simply to traverse the distance of the runs, supports a conclusion that time in excess of 10 hours was required to complete the run.

Second, even the drivers who testified that the runs could be completed in under 10 hours provided time estimations that could exceed 10 hours. Chuck Liesenfeld testified that the early run could take 10 to 12 hours if weather slowed the driver down, (Tr. 437), while the late run could take over 10 hours to perform if fueling was required. (Tr. 445-46).

Similarly, Ron Martin's estimations come close to exceeding 10 hours. He estimated 8 hours 30 minutes to 10 hours were required for the early run, and he stated that the late run could be completed in under 10 hours *provided* the driver take no personal breaks *and* fueled the truck during the route and not afterwards. (Tr. 481-86). Martin admitted that he had worked over 10 hours on some runs, but he attributed his time to personal breaks. (Tr. 486). The probativeness of Martin's estimations is also diminished by his unbelievable testimony concerning the lack of effect driving in harsh winter conditions, such as whiteouts, had on his driving times.

In addition, Mark Simmons's testimony that the routes could be completed in under 10 hours "easily" is questionable because of his testimony that he could drive 262 miles in under 4 hours, including city driving, weather delays, and governed truck speeds. Driving at a constant 65 miles per hour on a straight, unencumbered road, one can cover 260 miles in 4 hours. Thus, Mr. Simmons's estimations are questionable, at best.

Respondent attempts to rebut WHD's time estimations with time logs kept by Chuck Liesenfeld and Ronald Martin. (Tr. 453-60; RX 2). I find the test run documents are of little probative value, however, for the following reasons.

First, the documents are not dated, and 3 of the test runs do not indicate which driver logged the time. (RX 2, p. 1-2). Chuck Liesenfeld could not remember how many of the test runs he had performed, nor could he recall the dates on which the runs were completed. (Tr. 455-56, 459).

Of the 11 test runs, 7 were completed in under 10 hours and 4 were completed in over 10 hours. However, if the same test runs had been completed on days in which fueling of the truck was required,¹³ 1 run would have been completed in under 10 hours, 1 run would have been completed in exactly 10 hours, and 9 runs would have taken over 10 hours to complete. (RX 2). Thus,

¹³ The document recording the test run states, "Trucks are fueled every 2 days/Add 30 mins to time." (RX 2).

the Respondent's time logs actually demonstrate that working the runs takes in excess of 10 hours a significant amount of the time.

Therefore, because her system of estimating work time was reasonable, her results comported with the evidence as a whole, and the Respondent failed to produce probative evidence to the contrary, I find that Ms. Rhodes's computations of hours, wages and benefits are reasonable, just, and supported by a preponderance of the evidence. Concomitantly, her approximation of damages is reasonable.¹⁴

D. Debarment

The remaining issue in this case is whether "unusual circumstances" exist to excuse the Respondent's violations so as to avoid the statutorily required debarment of three years. Section 5(a) of the statute specifically directs the Comptroller General to compile a list of violating contractors and distribute that list to all government agencies. In addition, the statute outlines that:

Unless the Secretary otherwise recommends because of unusual circumstances no contract of the United States shall be awarded...to any firm appearing on this list or to any firm, corporation, or partnership in which such persons or firms have a substantial interest until three years have elapsed from the date of publication

41 U.S.C. §354(a); 29 C.F.R. §4.188(a). The debarment of contractors is the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from the sanction. *Vigilantes, Inc. v. Administrator of Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992).

An affirmative finding of "unusual circumstances" is required under this provision and guided by a three-part test outlined in the implementing regulations. 29 C.F.R. §4.188(b)(3). The burden of proof rests with the violator. 29 C.F.R. §4.188(b)(1) The criteria for finding "unusual circumstances" outlined by 29 C.F.R. §4.188(b)(3) include a threshold finding that no circumstances exist which include:

- 1) a willful, deliberate or aggravated violation,
- 2) a violation resulting from culpable conduct such as:

¹⁴In the parties' "Joint Stipulation of Back Wages," the parties offer a relevant stipulation, stating, "The parties hereby stipulate that the revised back wage assessment of \$103,843.53 is due and payable by Groberg Trucking, Inc. and Kenneth Groberg, individually, if the Department prevails on the merits of this litigation and the Court finds reasonable the Department's estimates of actual hours worked by service employees on the Wyoming contract." (Department of Labor's Post-Hearing Brief, p. 18 and Exhibit 1 "Joint Stipulation of Back Wages #3").

- a) culpable neglect to ascertain whether the practices are in violation, or
- b) culpable disregard of whether the contractor was in violation, or
- c) culpable failure to comply with record-keeping requirements; and

3) a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

29 C.F.R. §4.188(b)(3)(i). If such instances are found, “relief from the debarment sanction cannot be in order.” *Id.*

If, and only if, there are no aggravating circumstances found, then the inquiry proceeds to compliance with express “prerequisites” for relief from the debarment sanction including “a good compliance history, cooperation in investigation, repayment of money due, and sufficient assurances of future compliance.” 29 C.F.R. §4.188(b)(3)(ii). Finally, if the Respondent bridges both the threshold and prerequisite analysis, then “a variety of factors must still be considered” which include any prior investigations of the contractor for violations, any record keeping violations that may have impeded the investigation, the existence of a “bona fide legal issue,” the nature of any past or present violations, and prompt payment of any sums due. 29 C.F.R. §4.188(b)(3)(ii). The Regulations also impose an affirmative duty on the contractor to ensure compliance and eliminate any burden shifting to subordinate employees or claims of simple negligence as defenses. 29 C.F.R. §4.188(b)(4-6).

In the present case, the Respondent committed willful and deliberate violations, preventing relief from the debarment provision. The company failed to keep track of its employees’ work hours, opting instead to enforce a set, 10-hour pay day. Kenneth Groberg admits that the time cards did not record “actual time,” and he also admitted that he never returned a time sheet to an employee in order for the employee to record his actual work time. (Tr. 402). Groberg knew that the routes took over 10 hours to complete on occasion, as he admitted that some of the test runs driven by drivers Ron Martin and Chuck Liesenfeld took over 10 hours to complete.

Rather than variable time on every run, the evidence demonstrates that a 10-hour run was the standard as every time card reflects 10-hour work days, almost without exception. Four drivers – John Meier, Joseph DiJohn, Richard Kranz, and Mark Simmons – testified that the company explicitly or implicitly communicated to its employees that they were paid for 10 hours of work and no more. The testimony of the remaining drivers – Chuck Liesenfeld and Ronald Martin – is less credible, and the probative value of their testimony, which advanced that drivers were free to record all of their time, is undercut by their time cards which reflect the “standard” 10 hours of work per day like the other drivers’ time cards. Mr. Groberg’s belief that the runs could be completed in under 10 hours, beyond being undercut by his own supervisors’ test runs, does not change the fact that the runs often took longer than 10 hours for a variety of factors. Groberg cannot hide behind his unsupported belief, nor can he hide behind a written “policy” which was neither enforced nor believed. Groberg bore the responsibility to ensure compliance, and I find that he wilfully abdicated that responsibility.

In addition, the instant violations are similar to the company's previous violations. All three investigations have resulted in the conclusion that the company fails to adequately track the daily and weekly work hours of its employees. (Tr. 288-90, 297, 308, 411; JX 9). The 1994 investigation also revealed significant minimum wage and fringe benefit violations. Furthermore, in the prior investigation, the company was found to owe over \$27,000 in back wages, rendering its previous violation as "serious."

Even if the Respondent had shown no aggravating circumstances, the evidence does not establish that he met the express prerequisites for relief. Specifically, the Respondent's earlier, multiple violations of the Act prevent him from demonstrating a good compliance history. Likewise, the repayment "scheme" the company enacted last time - involving the improper return of awarded back wages to the company - casts serious doubt in the court's mind as to the company's repayment of monies now due and its assurances of future compliance.

Therefore, I find that "unusual circumstances" do not exist to prevent debarment.

VII. ORDER

Upon consideration of the entire record, it is hereby ORDERED that Respondent is found to be in violation of the Act and is delinquent in the payment of \$103,843.53 as follows:

<u>EMPLOYEES</u>	<u>AMOUNT DUE</u>
James C. Best	\$63.25
John Connell	\$6,026.41
Joseph DiJohn	\$2,295.26
Larry Eckholm	\$11,765.08
Patrick D. Frank	\$1,153.97
Richard Kranz	\$8,461.07
Charles Liesenfeld	\$28,000.83
Ronald V. Martin	\$21,070.54
John J. Meier	\$10,585.49

<u>EMPLOYEES</u>	<u>AMOUNT DUE</u>
Gary L. Moss	\$661.36
Lance Porter	\$263.59
Voylan Reinsbacll	\$60.59
Mark Simmons	\$10,459.51
Michael Matthie	\$278.55
Duane WhiteEyes	\$2,698.03
TOTAL AMOUNT DUE =	\$103,843.53

This award is supported by the parties' "Joint Stipulation of Back Wages," in which the parties provide, "The...revised back wage assessment of \$103,843.53 is due and payable by Groberg Trucking, Inc. and Kenneth Groberg, individually, if the Department prevails on the merits of this litigation and the Court finds reasonable the Department's estimates of actual hours worked by service employees on the Wyoming contract." (Department of Labor's Post-Hearing Brief, p. 18 and Exhibit 1 "Joint Stipulation of Back Wages #3").

It is further ORDERED that the United States Postal Service release any funds withheld from Respondent to the Secretary of Labor in satisfaction of Respondent's obligation under this Order.

It is further ORDERED that, in view of their absence of a showing of unusual circumstances, Respondent be placed on the ineligible list.

A

Joseph E. Kane
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If review of this decision is desired, the Respondents have 40 business days from the date of this decision to file a Petition for Review with the Administrative Review Board, U.S. Department of Labor, Washington, DC 20210 (the "Board"), under 29 C.F.R. § 6.20. Such filing will have the effect of making this decision inoperative unless and until the Board either declines to review the decision or issues an order affirming the decision.

